APPEAL NO. 010041

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on December 12, 2000, the hearing officer resolved the sole disputed issue by determining that the appellant (carrier) is liable for the spinal surgery recommended for the respondent (claimant). The carrier has appealed, asserting that the claimant's second opinion doctor did not concur in the cervical spine surgical procedure recommended by the claimant's surgeon and that, therefore, since there are not two concurring opinions recommending the proposed surgery, the carrier is not liable for the surgery. The claimant's response urges the sufficiency of the evidence to support the challenged determination.

DECISION

Affirmed.

The parties stipulated that Dr. P is the claimant's treating doctor; that Dr. M made the recommendation for spinal surgery; that Dr. B is the claimant's choice of second opinion doctor; and that Dr. K is the carrier's choice of second opinion doctor. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(k)(4) (Rule 133.206(k)(4)) provides that of the three recommendations and opinions (the surgeon's and the two second opinion doctors'), presumptive weight will be given to the two which had the same result unless the great weight of the medical evidence is to the contrary. The only opinions admissible at the hearing are the recommendation of the surgeon and the opinions of the two second opinion doctors. There is no dispute that Dr. K did not concur with the cervical spine surgery recommended by Dr. M. The carrier represented to the hearing officer that "the only real issue" in this case is whether Dr. B concurred with Dr. M's recommendation for cervical spine surgery. Rule 133.206(a)(13) defines "concurrence" as a second opinion doctor's agreement that the surgeon's proposed type of spinal surgery is needed. This definition goes on to describe how "need" is assessed and identifies certain types of spinal surgery. Rule 133.206(a)(14) defines "nonconcurrence" as a second opinion doctor's disagreement with the surgeons' recommendation that a particular type of spinal surgery is needed.

Dr. M's Recommendation for Spinal Surgery (TWCC-63) which he signed on February 25, 2000, states the recommended procedure as follows: "Anterior Discectomy, Cervical; Anterior Arthrodesis, Cervical; Anterior Instrumentation, Cervical, and Bone Graft, Cervical" without specifying the levels. Dr. B's report of May 15, 2000, states that he thinks the claimant has symptomatic herniated discs at C3-4, C4-5, and C5-6 and that he, Dr. B, "would concur that a cervical discectomy with fusion would be indicated at the levels of C3-4, C4-5, and C5-6." Dr. B further stated that the C6-7 level was negative with provocative discography and is therefore probably not a symptomatic level.

The Texas Workers' Compensation Commission issued a Result of Spinal Surgery Second Opinion Process letter to the claimant on June 8, 2000, advising him that "one of

the second opinion doctors agreed with your doctor's recommendation for spinal surgery, creating a two-to-one decision in favor of spinal surgery." Dr. M wrote the claimant's attorney on September 6, 2000, stating that the procedure recommended for the claimant is an anterior cervical interbody fusion and that "the level of surgery would be at C3-4, C4-5, and C5-6." He concluded by stating that he concurs with the need for this surgery.

In addition to challenging the dispositive legal conclusion, the carrier disputes the findings that the claimant has been diagnosed as having herniated discs at C3-4, C4-5, and C5-6; that Dr. M has recommended an anterior cervical interbody fusion at C3-4, C4-5, and C5-6; that Dr. B agreed that the recommended spinal surgery is indicated; and that presumptive weight is given to the two opinions which had the same result. The carrier asserts that Dr. B "had information" that Dr. M wanted to operate at the C-7 level, that Dr. B disagreed with surgery at the C-7 level, and that "[b]ecause [Dr. B] does not agree with the precise procedure proposed by [Dr. M], there is no concurrence . . . ."

Based on the evidence of record, we find no merit in the carrier's contention. The challenged findings are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Thomas A. Knapp
Appeals Judge